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NO. 91-1875

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

Sebastian C. Sisti,

Petitioner

versus

Merrill Lynch, Pierce, Fenner & Smith, Inc.,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPELLANT'S REPLY BRIEF

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Questions Presented

Respondent dissembles with the question he presents. Count 1 of the petition to vacate was grounded in 9 U.S.C Sec. 10 (d) which is where legal experts find "manifest disregard of the law" in the statute (Federal Arbitration Act). The District Court for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit could not have correctly decided this case because they treated "manifest disregard", indeed, all disregard of the law by arbitrators, as legal error. *See* Miller.

The real issue in this case continues to be conflict among the Circuits regarding the test of manifest disregard and a unanimous disinclination by the Circuits to follow the standard established by the Court in *Mitsubishi / McMahon,* to wit: in statutory causes of action the Court expects that arbitrators will resolve the issue according to the requirements of the statute. *See* Pp 10-11.

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Citations

Manevich v. Francis I. duPont, 338 F. Supp. 1124 (1972)

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jack Bobker, 808 F. 2nd 930 at 933 (quoted in Petition for Writ, P. 31).

Miller v. Prudential Bache Securities Inc.
884 F. 2nd 128, 130 4th Cir. (1989).

Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth Inc.
473 U.S., 636, 637 (1985)

Shearson/ American Express, Inc. v. McMahon
482 U.S., 232 (1987)

Rodriguez de Quijas v. Shearson/American Express., Inc.
109 S. Ct. 1917 (1989)

Upshur Coals Co. v. United Mine Workers,
933 F.2nd, 225 (1991).

The Reply

When the district judge wrote his order dismissing the petition to vacate (April 22, 1991) he was unaware that the Court of Appeals was about to recognize the existence of the doctrine of manifest regard for the first time in a case titled *Upshur Coals Co. v. United Mine Workers* (May 14- June 3, 1991).

Miller Treats Disregard of The Law as Legal Error

Until that day, the Court of Appeals had steadfastly refused to recognize manifest disregard as a valid basis for vacating arbitrators' awards. The ruling precedent in the Fourth Circuit in this regard was a case titled Miller v. Prudential Bache. In Miller, the Court of Appeals had declared:

"Even if Miller's argument is that the panel either misinterpreted or misapplied the applicable law - in this case either the borrowing statute or Rule 15 - there still exists no basis for overturning the panel's decision. Once again federal courts have consistently held that they will not set aside arbitrators' awards for mere errors of law". The Court of Appeals then cited four cases in which the courts had ruled that "It is well settled that an arbitrator's award will not be vacated on the grounds that the arbitrators misinterpreted applicable law". *See* Petition for Writ, P.32.

Miller Was Incorrectly Decided

Miller was clearly a statutory cause of action ("either the borrowing statute or Rule 15"). It was decided in 1989, two

years after *McMahon* where the Court ruled that in statutory causes of action it expects that arbitrators will resolve the issue according to the requirements of the statute.

Miller Was Incorrectly Decided
So This Case Was Incorrectly Decided

Because he was wholly unaware of the historic change of course impending in the Fourth Circuit, both at oral argument and in his Memorandum Opinion accompanying the order, the district judge applied *Miller* which denied that disregard of the law was a valid basis for vacating an arbitrator's award ("Even if...there still exists no basis.."). It was for this reason that the district judge denied the petition to vacate the award. In the Memorandum Opinion accompanying his order the district judge wrote:

"Sisti argues that he has stated a claim in Count 1 because his legal claim is so clear that there is no explanation for the arbitrators' decision other than that they knowingly disregarded the law...The court concludes that regardless of the verbiage used, Sisti's contention amounts to an argument of legal error, an argument that fails to present a valid reason to vacate an arbitration judgment". *See* Petition for Writ, Pp. 22-30 for full text of district court's opinion.

In a footnote to this commentary, the district judge corrected his misstatement of Appellant's Count 1. *See Petition for Writ, P. 27.*

Respondent's Counsel Proclaimed: That Fourth Circuit Law Did Not Recognize Manifest Disregard

Betraying uncanny adaptability, at oral argument Counsel who now argues that Appellant never claimed manifest disregard argued strenuously that Appellant had. Here's what he said:

"Most importantly of all, though, is that disregard of the law, even if proven, is not a basis for this court to vacate an award".

Ten minutes later, he repeated:

"I believe we have already made clear disregard of the law is not the basis under Fourth Circuit law for setting aside an arbitration award". *See* Exh. 1, P. 14 below, Transcript of Pre-Trial Hearing.

The district judge did not disabuse Respondent's counsel of what he might reasonably have regarded as a blockheaded misrepresentation of Fourth Circuit law for the reason that the judge himself believed that Fourth Circuit law did not recognize disregard of the law as grounds for vacating arbitrators' awards.

Court of Appeals Prejudicially Denied Appellant Grounds of Manifest Disregard

A chronology of the cases would leave no doubt that the Court of Appeals knew that it had just recognized the doctrine of manifest disregard in the *Upshur Coals* appeal but was knowingly and willfully denying application of the doctrine to the Sisti case where the evidence of manifest disregard was overwhelming and where the standards newly recognized by the Court of Appeals had been met.

Outrageous Falsehoods By A Respondent In Panic

On Page 6 of his Brief In Opposition, Respondent brutally and viciously distorts the facts: "Neither the district court nor the Fourth Circuit applied or refused to apply the doctrine of manifest disregard of the law. The reason is plain. Sisti did not allege a claim of manifest disregard of law". In the very next paragraph, Respondent states: "Indeed, the district court expressly found that Sisti had alleged 'legal error' and not 'manifest disregard of the law'". *Where* did the district judge say that *Sisti* had alleged legal error ? *See* Page 5, *supra*. Also see full text of district court order, Petition for Writ, Pp. 22-30.

Manifest Disregard Pervades All Of Appellant's Petitions and Motions

The record will show that Count 1 of the Petition to Vacate (grounded in 9 U.S.C. Sec. 10d) alleges manifest disregard of the law by the panel, to wit: "The panel knew of such regulations and disclosure requirements yet totally disregarded the proper application of the law. The panel did not commit a mere error of law in making their decision".

Appellant Urged Court of Appeals To Recognize Doctrine of Manifest Disregard

Further, the entire thrust of Appellant's brief to the Court of Appeals (27 pages) was directed to the proof that the arbitrators had manifestly disregarded the law and that the Court of Appeals was remiss in not following the Supreme Court in this most fundamental of legal doctrines. Appellant cajoled, entreated, begged, implored and pleaded with the Court of Appeals to recognize the doctrine of manifest disregard.

Why Respondent Had To Misrepresent Appellant's Allegation of Manifest Disregard

Obviously, if the petition claimed knowing disregard of the law - which it did - Respondent would have to concede that the Court of Appeals should have granted Appellant a trial given its new-found recognition of manifest disregard as a valid basis for vacating arbitrators' awards. Respondent, therefore, had to concoct for this Court the falsehood that Appellant had not alleged manifest disregard of the law because he fears that, in the light of *Upshur*, this Court may rule that Appellant was unfairly denied right to reinstate suit in federal court.

Further, in the motion in opposition to Respondent's 12 (b) (6) motion Appellant presented evidence that the arbitrators understood the applicable law, read and suppressed discussion of the only precedent governing the principal issue in the case (*Manevich*) and had correctly stated the applicable law. (*See* Record)

Who Is Misleading This Court ?
First Clue: No Mention of Manevich

Nowhere in the entire record will the Court find any mention by Respondent of *Manevich*, the precedent governing the SMA. He will not let the word *Manevich* pass his lips. Neither would the arbitrators or the district judge. Why this collective suppression of *Manevich* ? Because merely to acknowledge the existence of *Manevich* is to reveal that one has read the *Manevich* court's definition of the SMA ("like a bank account") which gives the lie to Respondent's perjured distortion of the SMA as "a line of credit". *Manevich* is the critical proof that the two-lawyer

majority on the panel understood the applicable law. See *Manevich*, Petition for Writ, P. 33.

Second Clue: No Mention of 12 CFR 220.6

Like *Manevich*, nowhere in the entire record will this Court find any reference by Respondent to 12 CFR 220.6 the regulation governing the SMA. Not a single word. Not even in his Brief in Opposition in this Court. To acknowledge to the courts that he knows the regulation is to acknowledge that he above all brokers understands it. He dares not risk depth of discussion of 220.6 for fear that some judge might ask whether or not he does indeed send SMA checks to the wary among his margin customers. Let Sisti argue 220.6. Respondent then need only enter general denials, as in: "Merrill Lynch takes the position that no law was disregarded". *See* Exh. 1, P. 14, below.

The Big Lie About The Big Lie

On page 7 of the Brief in Opposition, Respondent asserts that "Sisti's Petition Is Replete With Factual Errors" citing Appellant's charge that Respondent's margin specialist had "lied under oath for more than two hours".

That Respondent's Margin Specialist did so perjure himself for more than two hours is fully supported by the record. 6 of the 170 pages of this false swearing is in the record now (*Motion In Opposition to Respondent's Motion In Opposition Pursuant to 12 (b) (6) - R)*. The witness was joined in this fraud by the corporate representative, Respondent's counsel and, at key points, by the industry representative on the panel. The witness's depiction of the Special Memorandum Account (the "SMA") as "a line of

credit" (both in documentary and testimonial evidence) was not a harmless metaphor. It is exactly how Respondent treats the entire SMA: as a line of credit which allows him to lend 100% of the cost of all purchases in a contemptible "interest scam". The line of credit scam also permits him to pocket the credits in the SMA when the account is closed.

The Matter of The Transcript

Respondent has always had a complete set of audiotapes of the arbitral hearings. Counsel (two) who prepared Appellant's petition to vacate said nothing about submission of a complete transcript of the audiotapes with the petition. Appellant was told to "use what you need". Discussion at the pre-trial conference centered on whether or not a partial or complete transcript would be necessary for the trial, given its voluminous size. The district judge merely encouraged Appellant to prepare a complete transcript for the trial, which he did.

The Court's Ruling In McMahon

On Page 6, at II, Respondent boldly headlines the proposition that "whether arbitration awards may be vacated for manifest disregard of the law is irrelevant to the disposition of this case".

What he thinks is relevant is application of the doctrine of legal error. *See* his impassioned pleading for the doctrine of legal error (Pp.6-7, Respondent's Brief In Opposition), to wit:

"... the legal authority is monolithic and overwhelming that mere legal error by an arbitration panel does not state a basis for vacation of an arbitration award".

Based on the precedents he cites, the monolith appears to include every court but this one.

Respondent is apparently unaware of the Court's ruling in *McMahon*, where Justice O'Connor wrote:

"Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute. *See* id (*Mitsubishi*) at 636-637 and at n. 19 (declining to assume that arbitration will not be resolved in accordance with statutory law, but reserving consideration of the 'effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinstate suit in federal court')".

That is precisely what happened in this case. In what is clearly a statutory cause of action, Appellant was barred from reinstating suit in federal court because the arbitrators failed to resolve the issues in accordance with statutory law. The district judge then ruled that even if true the failure amounted to legal error. The Court of Appeals affirmed.

Mitsubishi, McMahon, Rodriguez Establish A Uniform Standard of Manifest Disregard

If *Rodriguez* was a reversal *in toti* of *Wilko* then the doctrine of manifest disregard may well be obsolete. But if *Rodriguez* is taken with *Mitsubishi* and *McMahon* to be a cohesive body of law, then the doctrine of manifest disregard is not obsolete; for in *Mitsubishi / McMahon* the

Court established a uniform standard for manifest disregard which dispenses with the complex test required by the Second Circuit and also dispenses with the difficult, if not impossible test imposed by some of the other Circuits.

This uniform standard assumes that arbitrators will follow the law and that they will resolve a statutory cause of action according to the requirements of the statute. By this standard there can be no "legal error" by arbitrators in a statutory cause of action.

Conclusion

If *Mitsubishi / McMahon / Rodriguez* are a cohesive body of law then the Court's ruling in *McMahon* is the uniform test for manifest disregard: Is it a statutory cause of action and was it resolved according to the requirements of the statute?

If this be true, then Respondent's opposition is wholly without merit since it is singularly based on the belief that, in arbitration, failure by the arbitrators to resolve a statutory issue according to the requirements of the statute may still be defended as legal error.

For all of the above reasons, Appellant prays that the Court will grant his petition for writ and "say what the law is" so that we may be delivered from this cacophony of tests, standards and judgments with respect to manifest disregard and legal error in judicial review of arbitration awards. In support of his petition Appellant respectfully invokes this opinion of Chief Justice Vinson's:

"The Supreme Court has never been primarily concerned with correction of errors in lower court decisions ...The certiorari function is not simply to do justice between the parties...The purpose of the establishment of one Supreme National Tribunal was, in the words of Chief Justice John Rutledge 'to secure the national rights and the uniformity of judgments'. That is our mission". (Quoted from *The Supreme Court: Views From the Inside*, Alan F. Westin, Ed. P. 48)

Respectfully submitted,

Sebastian C. Sisti

Exhibit 1

From the Transcript of the Motion to Dismiss
Argued April 17, 1991 in The United States District
Court for the Eastern District of Virginia,
Hon. Robert R. Merhige, Jr., Presiding Judge
Gilbert Halasz, Court Reporter.

MR. FUHR: "Well, the first basis Mr. Sisti states under the statutory provision is disregard of the law by the arbitration panel. It is established law, however, that disregard of the law by an arbitration panel is not a basis for a court vacating an arbitration award. Merrill Lynch takes the position that there was no disregard of any law.

"Mr. Sisti's sole basis for saying that the law was disregarded is that the arbitration panel did not hand down the award he seeks. He admits in his pleadings that the arbitrators were knowledgeable about the law; two of the three were attorneys, one of them a specialist in securities law, at that, and he states given that they were knowledgeable about the law and did not return an award for him, that constitutes a disregard of the law.

"That does not constitute a disregard of the law. That would create a de novo review of every claim of an arbitration award. Most importantly of all, though, is that disregard of the law by an arbitration panel, even if proven, is not a basis for this court to vacate an award".

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MR. SISTI: ...The arbitrators correctly stated the law. In my motion in opposition I submitted two pieces of evidence, and there are more, two pieces of evidence indicating that the arbitrators certainly knew the law".

•••

THE COURT: "Have you read Miller out of the Fourth Circuit ? Miller versus Prudential Bache ?"

MR. SISTI: "Yes, I have. Yes, I have, Your Honor. If I could find my notes on Miller."

THE COURT: "Well, what it simply says is that the court cannot vacate arbitration awards on the ground that the panel has committed errors of law".

MR SISTI: "These were not errors of law, they were not errors of law, not misinterpretation of law. It was clear, wilful disregard of the law. They understood the law. They chose to disregard it. Chose not to apply it. 220.6 is as clear as a bell. Manevich is as clear as a bell. 220.4 is as clear as a bell."

•••

MR. FUHR: "I will answer any questions about anything that was raised if you have any questions. I think we have already made clear disregard of the law is not the basis under Fourth Circuit law for setting aside an arbitration award".